

Internal Revenue Service  
**memorandum**

CC:TL-N-2166-92  
FS:P&SI:HFRogers

date: DEC 16 1991

to: District Counsel, Cleveland CC:CLE

from: Assistant Chief Counsel, Field Services CC:FS

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subject: [REDACTED]

This is in response to your undated request for field service advice.

ISSUES

1. Whether, for purposes of I.R.C. § 2032A, there has been a disposition where the court orders property to be sold in lieu of partition and a member of the qualified heir's family purchases the property at auction sale. 2032-4000

2. If the member of the qualified heir's family will not sign the recapture agreement, whether there is a taxable event. 2032-4000

3. If there is a taxable event, how and against whom should the tax liability be asserted. 6201-0000

CONCLUSION

1. For purposes of section 2032A, there has not been a disposition.

2. There is a taxable event if the qualified heir's family member does not sign a recapture agreement.

3. In the absence of a waiver of restrictions on assessment, a notice of deficiency should be issued to the decedent's son.

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### FACTS

At the time of his death in [REDACTED], the decedent and his daughter each owned an undivided [REDACTED] interest in a parcel of real property. The decedent bequeathed his interest in the property to his son. The estate elected special use valuation pursuant to I.R.C. § 2032A for the father's interest in the property.

The relationship between the decedent's son and daughter was and remains hostile. The daughter filed a partition action in the Ohio state court seeking a sale of the property. The court determined the property could not be divided, had it appraised and ordered a sale of it. At the sheriff's sale, the daughter and her husband outbid the son for the property. The sheriff's deed transferred the property to the daughter and her husband. Subsequent to the sale, the daughter and her husband filed a Motion to Hold Proceeds to pay for any "recapture" of federal estate taxes pursuant to section 2032A(c).

It is the daughter's position that the transfer of the son's interest in the property gives rise to the recapture provisions. It is the son's position that the transfer of the property was to a "member of the family" as defined by section 2032A(e)(2) and, therefore, there has not been a taxable event and the daughter and her husband have stepped into the son's shoes and must assume all responsibility that may arise if and when a taxable event does occur.

### DISCUSSION

Pursuant to section 2031, "The value of the gross estate shall be determined by including to the extent provided for in this part, the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated." Ordinarily, the value of such property is its fair market value which is determined under the willing buyer/willing seller standard mandated by Treas. Reg. § 20.2031-1(b).

However, if the decedent, his estate and the property meet all of the requirements established by section 2032A and the regulations thereunder, the executor may elect to have the property valued based on the use under which it qualifies, rather than at its fair market value. See section 2032A(a)(1). In order to qualify for valuation under section 2032A, the real property must pass from the decedent to a qualified heir of the decedent. As defined in section 2032A(e)(1), the decedent's son is a qualified heir.

Apparently, in the instant case, section 2032A was properly elected and the property continued to qualify for special use valuation, at least until the court granted the writ of partition. Therefore, this office is being called upon to answer the narrow question of whether the partition caused a disposition of the property for tax purposes.

#### Issue 1

Pursuant to section 2032A(c), as in effect at the time of the decedent's death, there will be imposed additional estate tax "If, within 15 years after the decedent's death and before the death of the qualified heir--(A) the qualified heir disposes of any interest in qualified real property (other than by a disposition to a member of his family). . . ." Section 2032A(e)(2) defines "Member of Family" to include "a lineal descendant of such individual, of such individual's spouse, or of a parent of such individual." "Individual" refers to the qualified heir who makes the disposition. The daughter is a lineal descendant of the son's (the qualified heir's) parent; therefore, the daughter is a member of the qualified heir's family for purposes of section 2032A.

The Ohio Rev. Code Ann. Ch. 5307 discusses partition actions. Ohio Rev. Code Ann. § 5307.01 states that "Tenants in common, survivorship tenants, and coparceners, of any estate in lands, tenements, or hereditaments within the state, may be compelled to make or suffer partition thereof . . . ." For an amicable partition, the person of whom partition is demanded may appear in court and consent to a partition of the estate agreeable to the prayer and facts set forth in the partition before a writ of partition is issued. In such cases, the court shall order the sheriff to execute and deliver a deed to each person entitled to a deed for the portion set off and assigned to him. Ohio Rev. Code Ann. § 5307.08. When the commissioners determine that the estate cannot be divided according to the writ of partition without manifest injury to its value, they shall return that fact with a just valuation of the estate. Ohio Rev. Code Ann. § 5307.09. In such cases, one or more of the parties in the action for partition may elect to take the estate at the appraised value and, upon payment, the sheriff shall make and execute a conveyance to the parties electing to take it. Ohio Rev. Code Ann. § 5307.10. However, if no election is made, the court may order a sale of the property at public auction. If the court approves the sale, the sheriff shall execute and deliver a deed to the purchaser. Ohio Rev. Code Ann. §§ 5307.11, 5307.12, 5307.13.

It is the Service's position that, where, two qualified heirs who hold property as tenants in common determine to voluntarily partition the property, additional estate tax will

not be imposed under section 2032A(c). Even where one qualified heir receives more property than is commensurate with his interest prior to partition, this will be treated as a disposition to a member of the qualified heir's family and no additional estate tax will be imposed on the disposition. LTR 91-13-028.

Similarly, it is apparent that where a qualified heir and a member of his family agree to an amicable partition, there will be a disposition to a family member and no additional estate tax will be imposed on the transfer. Likewise, where one family member pays the appraised value and the property is transferred to him pursuant to Ohio Rev. Code Ann. § 5307.10, there will be a disposition to a family member and no additional estate tax will be imposed on the disposition. We do not see any principled distinction between these cases and the case where a family member purchases the property at auction. In each case, the sheriff is acting solely as a straw man in transferring the property. It should be treated as a disposition from the qualified heir to a member of his family and no additional estate tax should be imposed thereon.

## Issue 2

It is the Service's position that, where there is a disposition of property to a member of the qualified heir's family, the member of the family must execute and sign a written agreement consenting to personal liability for additional estate tax that may arise in the event of an early disposition or early cessation of qualified use with respect to the transferred property. This position is based on section 2032A(d)(2) which requires each person who has an interest in the specially valued property to sign a written agreement consenting to liability for additional estate tax in the event of certain early dispositions of the property or early cessation of the qualified use. Rev. Rul. 85-66, 1985-1 C.B. 324; LTR 83-06-049 (Nov. 10, 1982).

We recognize that section 2032A(d) discusses the submission of the recapture agreement with the Form 706 filed within nine months of the decedent's death. Further, there are no regulations that impose this obligation on the qualified heir's family member. We could not find any cases that address this point. However, this position is consistent with the theory underlying section 2032A. As the Tax Court articulated in Estate of Bettenhausen v. Commissioner, T.C. Memo. 1986-73:

The legislative history to section 2032A reflects a recognition by Congress that to pay an estate tax liability based on the highest and best use valuation of family farm or business real property, heirs may have to

terminate use of the property as a family farm or business. Congress thought it desirable, however, to encourage the use of property for family farms and other business purposes.

Congress also recognized that section 2032A would allow for a windfall if the alternate valuation was used and the property was soon sold or ceased to be utilized in the manner which allowed for the alternate valuation.

Hence, the additional estate tax recapture and lien described above were provided for in sections 2032A(c) and 6324(B) [sic] respectively. However,

[t]he Congress believed that each person receiving an interest subject to potential recapture should agree to this potential liability, especially since that person may not have received the tax benefits from the special use valuation . . .

The section 2032A(d)(2) agreement was, therefore, provided for. (Citations omitted.)

51 T.C.M. (CCH) 488, 490 (1986).

Pursuant to Service position, the requirements of section 2032A(d)(2) are no longer met because the decedent's daughter is unwilling to sign the recapture agreement. However, the executor of the decedent's estate must be notified of the daughter's failure to sign the recapture agreement and then be given 90 days after notification to secure her signature on a recapture agreement. This position is based on section 2032A(d)(3). In this case, the executor made a timely election which substantially complied with the regulations. However, the signature of a person required to enter into the agreement was not on the agreement. Thus, the executor must be given time to secure her signature before the estate's entitlement to its section 2032A election is forfeited and additional estate taxes imposed. If there is no longer an acting executor then, pursuant to section 2203, notification should be given to the decedent's

daughter as the person in actual or constructive possession of the property. In order to ensure that all proper parties are notified, we recommend that the decedent's son also be given notice .

### Issue 3

The decedent's son is personally liable for the additional estate tax. Section 2032A(c)(5). In order for the decedent's son to be released from the personal liability for the recapture tax under section 2032A(c), the decedent's daughter must sign the agreement specified in section 2032A(d) agreeing to personal liability for the entire recapture tax. LTR 91-13-028.

The additional estate tax is imposed under section 2032A(c) and not under section 2001. Therefore, the additional estate tax is imposed on the qualified heir and not on the estate. In the absence of a recapture agreement signed by the decedent's daughter consenting to personal liability, any additional estate tax must be assessed against the decedent's son.

Under section 6211(a), a "deficiency" in tax imposed by subtitle B is the difference between the correct tax and the tax shown on the return as increased by prior assessments and decreased by rebates. In the present case, the decedent's son filed a Form 706A and reported thereon additional estate tax due of zero. Therefore, no additional estate tax has previously been assessed and no rebates have been made. Thus, the deficiency in this case is the amount of the additional estate tax imposed by section 2032A(c).

Under the general statutory scheme, unless the taxpayer waives restrictions on assessment, the Service starts the process of assessing a deficiency of tax described in section 6211(a) by mailing a notice of deficiency to the taxpayer before the expiration of the period of limitation for assessment under section 6501. With certain exceptions not relevant here, section 6213(a) provides that no assessment of a deficiency in respect of any tax imposed by subtitle B and no levy or proceeding in court for its collection shall be made, begun or prosecuted until such notice has been mailed to the taxpayer and the period for petitioning the Tax Court has expired or, if the taxpayer files a petition, the Tax Court decision is final.

Section 6212(a) authorizes the Service to mail a notice of deficiency to a taxpayer when a deficiency in respect to any tax imposed by subtitle B is determined. The additional estate tax is imposed under section 2032A(c) of subtitle B. Thus, if section 2032A(f) is disregarded, there would be no doubt that a notice of deficiency would be a necessary step towards assessing the additional tax.

While section 2032A(f), on its face at least, authorizes assessment "notwithstanding the provisions of any other law or rule of law," it is not worded as an explicit exception from the deficiency procedures for the assessment of additional estate tax. In comparison, the Code specifically provides that deficiency procedures do not apply to certain penalty assessments. See sections 6696(b), 6703(b). [REDACTED], GCM 39,118, I-150-83 (Aug. 12, 1983) also discusses the mailing of a notice of deficiency when additional estate taxes are to be imposed. If a deficiency in additional estate tax is determined, the Service should either secure a signed waiver from the heir (the decedent's son) or issue a notice of deficiency prior to making the assessment.

#### Synopsis

At the present time, the Service is not entitled to the money held by the court but is entitled to a lien on the property. Therefore, the Common Pleas Court should be requested to continue imposing the lien on the property until the expiration of the section 2032A statutory period or until the additional estate tax has been paid. In the meantime, the executor (or the decedent's daughter and son if there is no longer an acting executor) of the decedent's estate should be notified that the decedent's daughter must sign a recapture agreement within 90 days or that additional estate tax will be owed pursuant to section 2032A(c). If she does not sign the recapture agreement during that time period, a notice of deficiency should be issued to the decedent's son. Upon the expiration of the statutory period imposed by section 6213, the tax may be assessed against the son.

#### Miscellaneous

We have forwarded a copy of your request for field service advice to the General Litigation division because the request asked for assistance in several matters that are within their jurisdiction. We will further advise you upon receipt of their response.

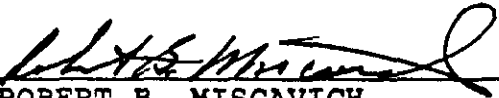
It is possible that the transfer of the property may have implications to the estate's section 6166 election as well. See LTR 83-06-049. This memorandum does not address this issue. It is recommended that your Estate and Gift Tax group examine this issue.

- 8 -

If you have any further questions, please contact Helen Rogers, of this office, at FTS 566-3521.

DANIEL J. WILES

By:

  
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Attachments:

LTR 91-13-028

LTR 83-06-049